NO. 683.

IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

HOME LAND & CATTLE COMPANY, a Corporation, and the NATIONAL BANK OF COMMERCE, a Corporation,

Appellants.

vs.

CORNELIUS J. McNAMARA and THOMAS A. MARLOW, Co-partners under the firm name and style of McNAMARA & MARLOW.

Appellees.

BRIEF OF APPELLANTS.

W. E. CULLEN,
E. C. DAY,
W. E. CULLEN, JR.,
Solicitors for Appellants.

Appeal from the Circuit Court of the United States for the District of Montana.

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BRIEF OF APPELLANTS.

This is a suit in equity commenced originally in the District Court of the Tenth Judicial District of the State of Montana in and for the County of Valley, and removed on petition of defendants to the Circuit Court of the United States for the Ninth Circuit, District of Montana, and was commenced by Cornelius J. McNamara, and Thomas A. Marlow, co-partners under the firm name and style of McNamara & Marlow, citizens of the State of Montana, against the Home Land and Cattle Company, a corporation organized under the laws of the State of Missouri,

and the National Bank of Commerce, a national banking association, whose principal place of business is at St. Louis, in the State of Missouri, to compel the specific performance of a contract for the sale of cattle by the delivery to the complainants of 457 head of stock cattle which were taken into possession by a receiver appointed by the State Court upon the filing of the original complaint. The contract of which specific performance is sought is as follows (Record p. 12):

"This agreement made and entered into on this 27th day of May, A. D. 1897, at Chicago, County of Cook and State of Illinois, by and between The Home Land & Cattle Company, a corporation existing under the laws of the State of Missouri, by its president, Wm. F. Niedringhaus (hereinafter called the party of the first part) and McNamara & Marlow, of Big Sandy, Montana, (hereinafter called the parties of the second part) witnesseth: That said party of the first part for and in consideration of the sum of one dollar and other valuable considerations, hereby agrees to sell to said second parties all of their herd of stock cattle including steers—said herd consisting of thirty thousand (30,000) head more or less, now ranging upon the ranges in Valley, Dawson and Custer Counties, Montana, and being branded as follows to-wit: "Z" on right hip, "N-N" on left hip and side and any other brands owned by said first party. The terms and conditions of said agreement to sell are as follows:

First: Said cattle are to be gathered by said first party and counted out to said second parties at the stockyards, at Nashua or Oswego, Montana, on line of Great Northern Railway during the regular roundup season of 1897, no cattle to be tendered or accepted later than November

1st, 1897; all stock cattle in said herd to be accepted by said second parties whenever tendered (prior to November 1st, 1897) in not less than train load lots; all steers from three year old and up and all spayed heifers and dry cows to be delivered and counted at same points, when marketable for beef in the opinion of said parties of the second part.

Second: All calves of the season of 1897, to be delivered without count or charge to said second parties, whether branded or unbranded..

Third: No lumpy-jawed cattle to be counted in deliveries.

Fourth: Should the two parties to this contract at the close of deliveries for 1897, fail to agree upon a price at which said second parties shall purchase the brands owned by said first party, together with all cattle bearing the same, said first party agrees, during the roundup season of 1898 (prior to November 1st, 1898) to again gather all of the remainder of said herd that it can find with diligent work and deliver the same to said parties of the second part at the same places and in the same manner and at the same price as provided for the season of 1897.

Fifth: The price to be paid by said parties of the second part for said cattle is the sum of twenty-five dollars ($25.00) per head for each and every head delivered as above provided; payable upon the delivery of said cattle.

Sixth: Said first party hereby acknowledges the receipt of the sum of fifty thousand dollars ($50,000) as a first payment of said cattle, which sum is to be deducted, $25,000.00 from the first deliveries made under this contract and $25,000.00 from deliveries not later than September 15th, 1897.

Seventh: Said second parties bind themselves to ac-

cept and pay for said cattle at the price stated when the same are tendered to them under the terms of this contract.

Eighth: Said first party hereby agrees to deposit with Messrs. Rosenbaum Bros. & Co., of Chicago, Ill., the written and acknowledged consent to this sale of all parties holding liens or mortgages of any kind against the cattle or property embraced in this contract upon the payment of fifty thousand dollars ($50,000) stated as the first payment above.

Ninth: Said first party hereby guarantees to deliver to said second parties during the season of 1897, not less than nine thousand head (9,000) of steers of the ages of three year old and up, and spayed heifers of the ages of four years and up; should they fail so to do they hereby agree to pay to said second parties the sum of twenty dollars ($20.00) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered.

Tenth: At the end of the roundup season of 1897 the parties of the second part agree to purchase of the party of the first part 500 head of saddle and work horses, at the price of twenty dollars ($20.00) per head. Said horses to be selected by parties of second part from entire herd of seven hundred head of party of first part and to be serviceable and sound horses. Work and saddle horses to be selected in proportion. This agreement to be binding upon the heirs, successors and assigns of both the parties hereto.

Witness our hands and seals that 27th day of May, A. D. 1897.

HOME LAND & CATTLE CO.,

(Seal) By Wm. F. Niedringhaus,

President.

(Seal) McNAMARA & MARLOW.

Witness:

Charles Haas,

Geo. W. Niedringhaus."

This contract had been assigned by the Home Land & Cattle Company to the National Bank of Commerce to secure to said bank payment of the indebtedness of the said Home Land & Cattle Company to it (Record p. 16.) The complaint among other things, alleged that the delivery of the cattle under the said contract began in July, 1897, and that on and prior to October 21st, 1897, there had been delivered and received under the said contract upwards of sixteen thousand (16,000) head of cattle of different ages and classes; that prior to October 18th, 1897, the defendant Company had notified the complainants that a final delivery under the said contract would take place on October 18th, 1897, at Oswego, Montana, which would consist of 820 head of steers, 631 head of stock cattle and the 500 head of horses, and that then and thereby it became known to the complainants that there would be short, after the completion of the said delivery, of said steers of three years old and upward 1,932 head; that at the said time and place of said last delivery there was delivered all of said 820 head of steers and all of said stock cattle save 457 head thereof and the said horses, and that the said defendants refused to deliver the said 457 head of stock cattle and horses until the defendant Bank was paid therefor in full at the contract price; that the complainants offered to pay for the said cattle and horses provided the said defendant would at the same

time pay for the steer shortage, and demanded payment of said amount, offering in return to pay the difference between the amount due on the cattle and horses delivered and remaining to be delivered and the amount due on account of said shortage, but defendants refused to make any further deliveries until the complainants had paid the whole of the contract price. The amended complaint also contained allegations of the use to which said cattle were to be put, by reason of which it was claimed that they possessed a special and peculiar value, which could not be adequately compensated for in money damages and that the defendant, the Home Land & Cattle Company was insolvent, by reason of which facts it was averred that the complainants could only be relieved in equity by a specific performance of the said contract as to the delivery of the said 457 head of cattle.

The defendants filed their joint answer (Record p. 18) admitting the allegations of the bill as to the execution of the contract, its assignment and the delivery of sixteen thousand head of cattle, but denying specifically the allegations as to the breach of contract on their part and averring that the complainants had committed a breach of the contract by the failure to make payment for deliveries of cattle which had been made on the 21st day of October, 1897, and that by reason of said falure said defendant had refused to make further deliveries unless the complainants first complied with the contract on their part. The answer further denied the equities of the bill with reference to insolvency and that the cattle had a

special or peculiar value which could not be adequately compensated for in money damages.

After issue joined by replication the matter was, by order of the court, (Record p. 27) referred to the Master in Chancery to hear the testimony and report the same to the court, together with his conclusions of fact and law therein. Testimony was offered before the Master both oral and by deposition, (Record pp. 62 to 614) and after the matter had been fully presented to him, he returned into court his findings of fact and conclusions of law (Record pp. 30 to 37), which are in words and figures as follows:

FINDINGS OF FACT.

1. That at all the times in the pleadings and these findings mentioned, Cornelius J. McNamara and Thomas A. Marlow were and are co-partners under the firm name and style of McNamara & Marlow, and citizens and residents of the State of Montana.

2. That at all the times in the pleadings and these findings mentioned, the defendant, the Home Land & Cattle Company was and is a corporation duly incorporated under the laws of the State of Missouri, and a citizen and resident of said State of Missouri, with its principal place of business in the City of St. Louis in the State of Missouri.

3. That at all the times in the pleadings and these findings mentioned, the National Bank of Commerce was and is a national banking corporation, duly incorporated under the acts of Congress of the United States of America, relating to the organization of National Banks, and a citizen and resident of said State of Missouri, with its

principal place of business in said City of St. Louis.

4. That upon the 27th day of May, 1897, at the City of Chicago, in the State of Illinois, the plaintiffs, Cornelius J. McNamara and Thomas A. Marlow and the defendant, the Home Land & Cattle Company, executed and entered into a certain contract in writing. Said contract is marked Exhibit A and made a part of these findings.

5. That upon the 28th day of May, 1897, the defendant, The HomeLand & Cattle Company, by a certain instrument in writing, sold, assigned, transferred and set over all its right, title and interest in and to said contract specified in the fourth finding. Said assignment is marked Exhibit B and annexed to the amended bill of complaint herein, and made a part of these findings.

6. That deliveries of cattle by the defendant, The Home Land & Cattle Company to the plaintiffs under said contract Exhibit "A" commenced upon the 11th day of July, 1897, and continued from time to time until the 22nd day of October, 1897, inclusive; and that no other deliveries of said cattle under said contract have been made by said defendants, or either of them.

7. That during the year 1897, there were delivered to and received by the said plaintiffs from the defendant, The Home Land & Cattle Company, sixteen thousand cattle of different ages and classes.

8. That during the year 1897, the plaintiffs received under said contract Exhibit A, through the Board of Stock Commissioners of the State of Montana, the proceeds of the sales of one hundred and forty-eight strays belonging to the defendant, The Home Land & Cattle Company.

9. That the plaintiffs have received under said contract Exhibit A, from the defendant, The Home Land &

Cattle Company, 7,135 steers of the ages of three years and up, and spayed heifers of the ages of four years and up of the nine thousand steers and heifers specified in the ninth clause of the terms and conditions of the said Exhibit A; and that 1,865 of said steers and heifers have not been delivered to the plaintiffs under said contract by said defendants, or either of them.

10. That upon the 18th day of October, 1897, the defendant, The Home Land & Cattle Company notified the plaintiffs by a telegram that it would deliver to them upon the 21st inst., at Oswego in the State of Montana, 820 steers, 631 stock cattle and 500 head of horses. Reference is hereby made to Exhibit C, and made a part hereof.

11. That the defendant, The Home Land & Cattle Company, upon the 21st and 22nd days of October, 1897, delivered to the plaintiffs 933 head, consisting of 820 steers and some stock cattle of the value of the sum of twenty-three thousand three hundred and twenty-five dollars ($23,325.00); that the defendant, The Home Land & Cattle Company, was then prepared to deliver to the plaintiffs under the said contract Exhibit A, 457 head of stock cattle and 500 head of horses, but refused so to deliver the same or any part thereof, unless the plaintiffs first delivered to said defendants a draft for said sum of $23,325.00 in payment of said 933 head; that plaintiffs then refused to deliver to said defendants or either of them, a draft for said sum, or any other sum, but offered to pay for said cattle and horses upon their delivery, provided that said defendants, or either of them would pay to the plaintiffs the amount due for shortage in the number of said steers and spayed heifers under said contract at the specified price of twenty dollars per head; that the

plaintiffs then presented to the defendants a statement of the accounts between the said parties, including said claim of shortage, and tendered to the defendants the sum of nine thousand six hundred and seventy-five dollars ($9,675.00) in full payment of said 933 head, and said 457 stock cattle and said 500 horses, and 113 strays, to-wit:

933 head at $25.00	$23,325
457 head at $25.00	11,425
113 head strays at $25.00	2,825
500 head horses at $20.00	10,000
Total	$47,575
Shortage 1,895 head at $20.00	37,900
Balance due defendants	$9,675

and that the defendants refused to accept said tender of said sum of $9,675.00 or settle said claims of the plaintiffs on account of said shortage, and refused to deliver to the plaintiffs the said horses, or said herd of said 457 head of stock cattle.

12. That the defendant, The Home Land & Cattle Company finished its roundup for the season of 1897, upon the 22nd day of October, 1897, and had not made any preparations for, and did not intend to make any further deliveries under the said contract Exhibit A, on or before the first day of November, 1897.

13. That the defendant, The Home Land & Cattle Company, did not have upon its range in said State of Montana, on the 22nd day of October, 1897, any number exceeding 300 head of said steers of the ages of three years and up, and spayed heifers of the ages of four years and up, and that the plaintiffs then knew that the

defendant, The Home Land & Cattle Company, could not deliver said 9,000 head of steers and heifers specified in said contract Exhibit A, and claimed that the shortage therein would be 1,895 head.

14. That the plaintiffs upon the 30th day of May, 1898, notified the defendant, The Home Land & Cattle Company, that they were prepared to receive the remainder of the cattle called for by said contract Exhibit A. Reference is hereby made to Exhibit E, made a part hereof. And that the defendant, The Home Land & Cattle Company, upon the ninth day of June, 1898, notified the plaintiffs that no further deliveries would be made. Reference is hereby made to Exhibit F, made a part hereof.

15. That in the year 1898, the defendant, The Home Land & Cattle Company rounded up and gathered in the State of Montana, 510 cattle of the brands mentioned in the complaint, classified as follows: 232 steers, 165 cows, 42 bulls, 4 heifers and 67 calves; that the same were shipped to the City of Chicago aforesaid; and the defendant, The Home Land & Cattle Company was paid therefor the sum of fifteen thousand two hundred and fifty-six dollars ($15,256.00.)

16. That there was a fluctuation in the value of cattle during the gathering season of 1897 and 1898, and there was an increase in the value of cattle of five dollars per head during the gathering season of 1897, and seven dollars per head during the gathering season of 1898.

17. That the plaintiffs depended upon the deliveries of the cattle mentioned in said contract Exhibit "A" to furnish cattle under beef contracts to the Government Indian reservations.

18. That he plaintiffs had prepared and made food provisions to winter at their ranches in Northern Mon-

tana, a quantity of cows, young steers and heifer stock to fill contracts, and depended upon the cattle described in said contract Exhibit "A" to fill the same.

19. That the defendant, The Home Land & Cattle Company, upon the 22nd day of October, 1897, was indebted to the defendant the National Bank of Commerce in the sum of twenty-five thousand dollars, upon certain promissory notes which had been renewed from time to time; that the amount of this indebtedness on the sixth day of April, 1899, was thirty-five thousand dollars; that the St. Louis Stamping Company, a corporation organized and existing under the laws of the State of Missouri was indebted to the defendant, The Home Land & Cattle Company, upon the 21st day of October, 1897, in the sum of $633,266.73; that the amount of this indebtedness upon March 21st, 1899 was $622,568.73; that the assets of the St. Louis Stamping Company upon the tenth day of April 1899, were $4,135,127.57, and the liabilities were $1,946,-901.57; that the defendant, The Home Land & Cattle Company, was during the times in the pleadings and these findings mentioned, and is now, a solvent corporation.

20. That the defendant, The Home Land and Cattle Company, is not indebted in any sum, except the said sum of thirty-five thousand dollars specified in the nineteenth finding, and such sum as may be due to the plaintiffs by reason of the liabilities arising out of the said contract Exhibit A.

21. That the plaintiffs made all payments to the defendants at the times when the same became due and payable under the terms and conditions of said contract Exhibit "A."

22. That the defendant, The Home Land & Cattle

Company, refused to deliver to the plaintiffs upon the 22nd day of October, 1897, the 457 head of cattle and five hundred head of horses.

23. That the defendant, The Home Land & Cattle Company, refused to make further deliveries to the plaintiffs under said contract Exhibit A, during the gathering season of 1898.

24. That the amount and property involved in this action exceeds the sum and value of two thousand dollars, exclusive of interest and costs.

25. That said 457 head of stock cattle consisted of 270 cows and heifers; one stag, thirty-three bulls and fifty two-year-old steers; 45 one-year-old steers, 27 two-year-old heifers and thirty-one one-year-old heifers; that the same were branded on th right hip; that the same were turned over by The Home Land & Cattle Company to and received by the Receiver appointed by the State Court under its order, in an action instituted in said court, and that the said Receiver thereafter sold and delivered the same to plaintiffs.

CONCLUSIONS OF LAW.

First:—That the plaintiffs have performed or been ready and willing at all times to perform, all the terms and conditions of said contract Exhibit A, on their part to be performed.

Second:—That the defendant, The Home Land & Cattle Company, has not performed the terms and conditions of said contract Exhibit A, upon its part to be performed.

Third:—The paragraph marked ninth of the terms and conditions of said contract Exhibit A, is a material part thereof, and plaintiffs relied upon the guaranty and agreement therein contained.

Dated this fourteenth day of September, 1899.

HENRY N. BLAKE,

Master in Chancery.

To these findings the defendants filed exceptions (Record pp. 38 to 41), which said exceptions are in words and figures as follows:

DEFENDANT'S EXCEPTION TO MASTER'S REPORT

"Come now the defendants, The Home Land & Cattle Company and the National Bank of Commerce of St. Louis and except to the findings of fact and conclusions of law filed herein by Henry N. Blake, Master in Chancery, in the following particulars, to-wit:

I.

Defendants except to finding No. nine, for the reason that the evidence does not justify said finding in this, that the evidence shows that 7,020 head of steers and heifers had been delivered to the plaintiffs, and that they had received the proceeds of 148 strays making a total of 7,168 received by the plaintiffs and leaving only 1,832 head of said cattle not delivered. (See Plaintiff's Exhibit "G" and defendants' deposition of A. Niedringhaus, pp. 2 and 3 and findings No. 8.)

II.

Defendant's except to the 12th finding of fact for the reason that the evidence does not justify the said finding in this: That the only evidence as to the intent of the defendants with reference to further deliveries is the testimony of the witnesses Blackman, Sharp and Albert Niedringhaus, each of whom testified that it was their intent to deliver such other cattle as they were able to obtain prior to the first day of November.

Defendants' depositions pp. 72, 84, 105, 108, 152.

Defendants except to the said 12th finding on the further ground that the same is immaterial and irrelevant in this, that after the refusal of the plaintiffs to make the payments as found in No. 11, the defendants were under no obligations to make deliveries under the said contract.

III.

Defendants except to findings numbered 14, 15, 17 and 18 on the ground that the same are immaterial.

IV.

The defendants except to finding No. 21 for the reason, first, that he same is a conclusion of law, rather than a finding of fact, the duty of the plaintiffs to make the payments depending upon the construction of the contract, Exhibit "A" which said construction is a question of law for the court; and second, the said finding, if it may be considered a finding of fact, is not supported by the evidence and is in conflict with finding No. 11, which is supported by the testimony of all of the witnesses in the case who testified in regard to the payments.

V.

The defendants except to finding No. 22 for the reason that the same omits the conditions attached to the refusal of the defendants to deliver the cattle therein mentioned and is therefore incomplete.

VI.

The defendants except to finding No. 23, for the reason that the same is immaterial.

VII.

The defendants except to the conclusions of law numbered First and Second, for the reason that the same are not supported by the findings of fact and are against the law in this: That the contract, Exhibit "A," required the plaintiffs to make payments as the deliveries were

made and the finding of fact No. 11 shows that the plaintiffs refused to pay for cattle which had been already delivered, and that it was not until after this refusal to pay that the defendant refused to continue performance of the contract, and under the facts found the defendants were entitled to refuse to continue to perform the terms of the said contract until the plaintiffs had made payment for the cattle already delivered. It further appears from finding No. 11 and the evidence that the plaintiffs' offer to perform was not in compliance with the contract, or according to law, in that the plaintiffs had no right to an adjustment of the shortage of cattle to be delivered under clause Nine of the contract, until the expiration of the time in which deliveries might be made, and they could then only ask for an adjustment for the actual shortage, in this case 1,832 head, the damage to be computed on the basis of the difference between the market value of the cattle and the price agred to be paid, which in this case was found to be $5.00 per head (Finding No. 16.) For which reason the tender of performance on the part of the plaintiffs, as found in Finding No. 11, was not complete in law and did not place the defendants at fault. And the defendants were entitled to stand upon their demand of payment for cattle delivered, and the Master should have so found.

VIII.

The defendants except to the third conclusion of law, for the reason that the same is immaterial."

The matter coming on to be heard before the court upon the said exceptions, after argument the court overruled the exceptions of the defendants, upon the ground that the exceptions should have been presented to the

Master (Opinion, Record pp. 50 to 52) and confirmed the Master's report, and ordered a decree in favor of the complainants according to the prayer of the complaint (Record pp. 47 to 49.) From this decree made and entered on the 14th day of December, 1900, defendants have appealed to this court, assigning the following errors:

ASSIGNMENTS OF ERROR.

Come now The Home Land & Cattle Company and the National Bank of Commerce of St. Louis, Missouri, by their solicitors and counsel, and say that in the decree of the court herein made and entered on the 14th day of December, A. D. 1900, and in the records and proceedings therein, there is manifest error in this, to-wit:

I.

That the court erred in over-ruling the exceptions of the defendants to the report of the Master, on the ground that such exceptions had not been presented to the Master, for the reason that the said exceptions were exceptions drawn and filed in the said court under and in accordance with the provisions of Equity Rule No. 83, and were exceptions to the rulings made by the Master upon matters which had been fully presented to him.

II.

The court erred in over-ruling defendants' Exception No. 2, upon the ground that the consideration of the same would require it to review all of the evidence in the case, for the reason that the said exception was drawn under and in accordance with the provisions of Equity Rule No. 83, and specifically pointed out the particular evidence relied upon to support the exception.

III.

The court erred in refusing to consider the defendants' Exceptions Nos. 3 and 6, for the reason that the findings therein mentioned were immaterial to the consideration of this cause.

IV.

The court erred in refusing to consider the defendants' Exception No. 4, for the reason that the said exception was taken to a finding purporting to be a finding of fact, whereas the same was a conclusion of law.

V.

The court erred in refusing to consider the defendants' Exception No. 5 to Finding No. 22, for the reason that the said finding reported by the Master was incomplete and the court was not bound thereby.

VI.

The court erred in refusing to consider the defendants' Exception No. 7, being exception to the conclusions of law of the Master's Nos. 1 and 2, for the reason that the said conclusions were not supported by the Findings of Fact and were against the law, and the court was not bound by the conclusions of law of the Master, although no objection had been taken to them before him.

VII.

The court erred in refusing to consider the defendants' Exception No. 8, being an exception to the Master's conclusion of law No. 3, and in holding that the conclusion of law as found by the Master was correct, for the reason that the said conclusion of law so found by the Master

was immaterial to any of the issues in the said cause as made by the pleadings.

VIII.

That the court erred in refusing to consider the defendants' Exceptions to Finding No. 17, and in adopting the Findings of the Master as therein stated, for the reason that the same was immaterial to any of the issues in the cause.

IX.

The court erred in holding that the contract sued on was not what is termed a severable contract, for the reason that by the express terms of the contract, payment for the cattle was to be made upon the delivery thereof in train load lots, and it does not appear from the finding that the plaintiffs refused to pay for the cattle on the ground that such delivery was not made in train load lots, and therefore under and by virtue of the terms of the contract, payment for deliveries made became a necessary condition precedent to any further demand for deliveries.

X.

The court erred in holding that The Home Land & Cattle Company did not demand a rescission of the contract on the ground or on account of the failure to make payment for cattle delivered, for the reason that it was not necessary that the said Company should do more than demand payment for such deliveries before proceeding with other deliveries, and to refuse to make further deliveries until payment was received.

XI.

The court erred in holding that the plaintiffs were not required to pay the amount due for the cattle delivered as found by the Master, before demanding other deliveries, for the reason that by the terms of the contract the plaintiffs expressly agreed to pay for such cattle when delivered in train load lots, and it appears from the findings of the Master that train load lots of cattle had been delivered for which payment had not been made at the time that the defendants demanded the draft for the sum of twenty-three thousand three hundred twenty-five dollars ($23,325.00), as set forth by the Master in Finding No. 11.

XII.

The court erred in finding that The Home Land & Cattle Company was insolvent so far as the jurisdiction of Montana is concerned and that for that reason the plaintiffs' remedy at law would be inadequate, for the reason that the Master found and the Court has adopted the finding that The Home Land & Cattle Company was solvent, and the fact that such solvency did not exist in the State of Montana, was not of itself sufficient equity to give the court jurisdiction to decree specific performance of the contract for the sale of personal property.

XIII.

That the court erred in holding that it had jurisdiction to enforce specifically the performance of the contract in suit, and in holding and adjudging the specific performance of the said contract, for the reason that the said contract was one for the sale and delivery of goods and chat-

tels, and there was not shown any reason why an action for damages upon the said contract would not be an adequate remedy for the breach thereof, if any breach occurred.

XIV.

That the court erred in finding that The Home Land & Cattle Company and the National Bank of Commerce had failed to perform the said contract, so far as the same was required to be performed by them, for the reason that it appeared from the said contract and the Findings of Fact as reported by the Master that a delivery of cattle had been made to plaintiffs for which plaintiffs had refused payment and therefore said defendants were excused from any further performance of the said contract.

XV.

That the court erred in adopting the finding of the Master No. 11, in so far as the said finding established the balance due the defendants for the alleged shortage of cattle, and in so far as it finds that the plaintiffs tendered to the defendant the amount due under the said contract for cattle delivered, in this, that it appears from the said finding that the said shortage was based upon an estimate of twenty dollars per head for the amount of steers and spayed heifers, not delivered, less than 9,000, and for the reason that clause Nine of the contract in suit, which provided for the payment of the sum of twenty dollars per head for each and every head less than 9,000 not delivered, was an attempt to provide stipulated damages for the breach of said contract and was, under the laws in force in the State of Montana, where the said contract was to

be performed, at the time it was to be performed, null and void, and the plaintiffs were not entitled to any amount for steer shortage other than the difference between the market value of the value of cattle at the time the said contract was to be performed and the contract price as specified in the said contract.

XVI.

The court erred in adopting the Master's first conclusion of law to the effect that the plaintiffs had performed or been ready and willing at all times to perform all the terms and conditions of the contract in suit on their part to be performed, for the reason that it appears from Finding No. 11, that the delivery of cattle, amounting to 933 head, had been made to the plaintiffs, for which payment thereof had not been made to the defendants, and the tender claimed to have been made by the plaintiffs to the defendants of the sum of nine thousand six hundred and seventy-five dollars ($9,675.00) was not a tender of the amount due the said defendants for the said cattle so delivered to them; nor was it a tender of the amount due the defendants after allowing for the claim of shortage under the ninth clause of the said contract, for the reason that the stipulations of the ninth clause as to the allowance of twenty dollars per head for cattle less than the nine thousand specified therein, was, under the law in force in the State of Montana, where the said contract was to be performed, at the time it was to be performed, null and void, and the only amount which the plaintiffs were entitled to deduct for said shortage, if any, was the difference between the market value

of the cattle at the time the said contract was to be performed and the contract price specified, which, by Finding No. 16, was the sum of five dollars per head.

XVII.

That the court erred in adopting the second conclusion of law of the Master, to the effect that the defendant, The Home Land & Cattle Company had not performed the terms and conditions of the said contract upon its part to be performed, for the reason that by the Master's Finding of Fact No. 11, it appears that the defendants were ready and willing to deliver the 457 head of stock cattle referred to in said finding upon compliance with the terms of the contract by the plaintiffs, and it further appears from the said finding that the plaintiffs did not perform or tender performance of the terms of said contract to be performed by them.

XVIII.

That the court erred in decreeing the specific performance of the contract in suit, by the delivery to the plaintiff of the 457 head of stock cattle described in the complaint, for the reason that the court had no jurisdiction to specifically enforce the performance of a contract for the sale of personal property.

XIX.

That the court erred in decreeing the specific performance of the contract in suit by the delivery to the plaintiffs of the 457 head of stock cattle described in said decree, for the reason that the plaintiffs have not paid or tendered to the defendants the amount to be paid for the cattle, as in the said contract provided, nor have they per-

formed the terms and conditions of said contract to be performed by them.

XX.

That the court erred in entering its said decree in favor of the plaintiffs and against these defendants, and in not holding that it had no jurisdiction to specifically enforce the contract sued on, and in not ordering the said suit to be dismissed at the cost of the plaintiffs.

ARGUMENT.

I.

EXCEPTIONS TO MASTER'S REPORT.

The first assignment of error is to the effect that the court erred in overruling the exceptions of defendants to the report of the Master, on the ground that such exceptions had not been presented to the Master.

The basis of the court's ruling is shown by the following extract from the opinion (Record p. 52.)

"The exception of the parties to the report or any part thereof should have been first submitted to the Master for his consideration and action, so that he might know in what particular his report was objectionable, and to enable him to correct his errors and reconsider his opinion.

I think this matter of the consideration of these exceptions by the Court, in the first instance, comes fully and fairly within the rule and the principles laid down in the following cases: *Story vs. Livingston, 13 Peters, 359; Kimberley vs. Arms, 129 U. S. 524; Sheffield, etc. R. Co. vs. Gordon, 151 U. S. 290; Gay Mfg. Co. vs. Camp, 68 Fed. 68,* and a large number of cases cited therein."

An examination of the cases cited by the court discloses that the principles laid down in those cases can have no application to the exceptions in the case at bar.

In Story vs. Livingston, *supra*, Mr. Justice Wayne opens the discussion of the question of exceptions to the Master's report by saying:

"All of these exceptions except the third are irregularly taken and might be disposed of by us without any examination of them in connection with the Master's report. They are too general; indicate nothing but dissatisfaction with the entire report and furnish no specific ground, as they might have done, wherein the defendant has suffered any wrong, or as to which of his rights have been disregarded."

The third exception referred to was that the Master's report did not show that it contained all the evidence taken before the Master, and after laying down the rule which the learned Judge said accorded with chancery practice that objections must be taken before the Master, he continues:

"But without restricting exceptions to this course we must observe that the exceptions to the report of a master must state article by article those parts of the report which are intended to be excepted to."

In Kimberley vs. Arms, *supra*, Mr. Justice Field in opening his opinion says:

"The first question to be considered on the appeal relates to the effect to be given to the findings of fact and of law contained in the report of the Special Master. The court below refused to treat them as presumptively correct, so as to impose upon the excepting party the burden

of showing error in them."

And the court holds that where there has been a reference by consent the findings of the Master are presumptively correct. The question at bar was not in any way involved in the case.

So too in the case of *Sheffield, etc. R. Co. vs. Gordon, supra*, Mr. Justice Brown says:

"There are two difficulties in the way of considering the case upon these exceptions.

(1) The exceptions themselves are too broad and amount simply to a general denial of the facts and conclusions of the Master, * * * In other words they are general denials of the merits of the claim."

And whatever else is said in the opinion about objections being taken before the Master is clearly dicta.

The case of *Gay Manufacturing Company vs. Camp, supra*, was a case in the Fourth Circuit, where, from the opinion, there appears to have existed a rule of practice which Judge Simonton lays down as follows:

"To prevent misapprehension it is best to state that we do not require the conclusions of the Master on matters of law to be first excepted to before him. This is unnecessary. But we do require that matters of fact upon which exceptions to his report are made be brought to his attention in order that he might report them."

And in speaking of the particular points involved in the case he says:

"We cannot discover that the sum claimed as liquidated damages was ever called to his attention, or that he was ever requested to report on it."

It is apparent from this that the only point decided by

Judge Simonton was that the matters objected to must be brought to the attention of the Master; in other words, that the parties could not attend a hearing before the Master and except to his failure to make findings on matters in issue, without first calling those matters in issue to his attention. But the case at bar presents a very different question. The exceptions, waiving those based upon the grounds of immaterity, are exceptions to the findings made by the Master upon *matters* directly in issue, which were brought to his attention and as to which he had found in a specific manner. We contended before the trial court and now contend that the exceptions as to such matters are not within the rule laid down by Judge Simonton, but are governed by the provisions of Equity Rule 83.

Mr. Foster lays down the rule as follows:

"No exception will lie to any matter which was not objected to before the Master. In circuits where it is not the practice for Masters to serve drafts of their reports, an exception to the report, but not an exception to a ruling in evidence, can be filed without a preliminary objection."

Foster's Federal Practice Sec. 315.

The best statement, however, of the rule is that made by Judge Paul in the case of *Fidelity Insurance & Safety Deposit Company vs. Shenandoah Iron Company, 42 Fed. Rep. 372*, which is as follows:

"A third objection urged to the consideration of these exceptions is 'that they were not taken at the proper time; that they should have been filed before the Master had

completed his report, so that if there were errors in the report the Master could have had the opportunity to correct them.' This was formerly the English chancery practice. The Master made a draft of his report, notified counsel of his findings, gave them an opportunity to point out errors, and the Master considered and corrected them. It was also the practice of the federal courts in chancery, prior to the adoption of the equity rules of practice. This was the practice when *Story vs. Livingston, 13 Pet. 359,* was decided. This case has been strenuously urged upon the attention of the court as applicable to the exceptions under consideration. Story vs. Livingston was decided in January, 1839. The rules of equity practice were promulgated by the Supreme Court on March 2, 1842, and since that time the practice has been different from that indicated in Story vs. Livingston. So far from its now being required that exceptions shall be filed before the Master during the time he is making up his report, one month is allowed after the report has been completed and returned to the clerk's office in which to file exceptions thereto. Rule 83 of rules of practice in equity provides:

'The Master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from time of filing the report to file exceptions thereto ;and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired.'

This provision leaves no question as to the correctness of the practice pursued in this case. This view is sustained in the opinion of Judge Gresham in *Hatch vs. Railroad Co, 15 Myer, Fed. Dec. 839, 9 Fed. Rep. 856-860.*"

And again in *Jennings vs. Dolan*, *29 Fed. 861*, Judge Wheeler lays down the rule as follows:

"The defendants in both cases except to the finding of the Master that there was an established license fee, and object to a decree for anything beyond a merely nominal sum in the latter case. The Master submitted a draft report to the counsel of the respective parties and defendants' counsel deferred his objections and made no furthed question to the Master. The plaintiffs insist that he thereby waived all ground of exception to the report. But this exception is to a principal finding, upon all the evidence in the case about whcih nothing could be done before the Master except to request him to change his finding. The defendants were under no obligation to make that request after he had announced his conclusion upon that point, but could raise the question before the court as to whether the finding was warranted by the proofs, by filing his exception in court according to the rules of the court."

In *Hatch vs. Indianapolis & Sprinfield R. Co. 9 Fed. 856*, Judge Gresham points out the alterations in the chancery practice introduced by the adoption of equity Rule 83, which in effect are that when the case has been fully argued in the first instance to the master, it is not necessary to make any additional objections to his findings involving the entire case, but the proper practice is to file exceptions to the report and present them to the court, as provided for in Rule 83.

An examination of the exceptions sought to be taken by the defendants in this case, shows that, with the exception of exceptions 3, 6 and 8, which are based upon

the grounds that the Master's findings are immaterial, the remaining exceptions are exceptions to the findings of the Master upon matters which were brought to his attention and as to which the defendants could have made no other request of the Master, except that he change his findings,—a request which, as is said by Judge Wheeler, was unnecessary. Even according to the strict rule laid down by Judge Simonton, exceptions 4 and 7 should have been considered by the court, for the reason that they are exceptions to the Master's conclusions of law.

We therefore respectfully submit that the court erred in holding that he was bound by these findings of the Master, in so far as they were excepted to by the defendant, and that the First Assignment of Errorshould be sustained.

What has been said with reference to the first assignment of error applies also to the Second, Fourth, Fifth, Sixth and Seventh Assignments of Error.

The Third and Eighth Assignments of error, being based upon the ground that the findings of the Master as therein stated related to facts which were immaterial to the consideration of the case, may be passed without any further discussion.

II.

CONSTRUCTION OF CONTRACT.

Passing, however, the question of the right to except to the Master's findings of fact, the court considered the case upon its merits, and reached the conclusion that the contract in suit was not what might be termed a sever-

able contract, and that the appellants had no right to demand payment for the cattle delivered on October 21st, where they had not the ability to comply fully with the terms of the contract, requiring the delivery of 9,000 head of steers and heifers (Rec. p. 58.) In this we think the court erred, and Assignments of Error numbered Nine, Ten, Eleven and Fourteen were designd to present this ruling for review. Together they present the question of the construction of the contract and the rights of the parties thereunder, as determined by the circumstances existing on October 22nd, 1897. The terms of the contract in so far as they affect this question are as follows: (Rec. p. 12.)

"That said party of the first part for and in consideration of the sum of one dollar and other valuable considerations, hereby agrees to sell to said second parties, all of their herd of stock cattle, including steers—said herd consisting of thirty thousand head (30,000) more or less, now ranging upon the ranges in Valley, Dawson and Custer Counties, Montana, and being branded as follows, to-wit: "Z" on right hip, "N-N" on left hip and side and any other brands owned by said first party. The terms and conditions of said agreement to sell are as follows:

First: Said cattle are to be gathered by said first party and counted out to said second parties at the stock yards, at Nashua or Oswego, Montana, on line of Great Northern Railway during the regular roundup season of 1897, no cattle to be tendered or accepted later than November 1st, 1897; all stock cattle in said herd to be accepted by said second parties whenever tendered (prior to November 1st, 1897), in not less than train load lots; all steers from three years old and up, and spayed heifers and dry

cows, to be delivered and counted at same points, when marketable for beef in the opinion of said parties of the second part.

Fifth. The price to be paid by said parties of the second part for said cattle is the sum of twenty-five dollars ($25.00) per head for each and every head delivered as above provided; payable upon the delivery of said cattle.

Seventh. Said second parties hereby bind themselves to accept and pay for said cattle at the price stated when the same are tendered to them under the terms of this contract.

Ninth. Said first party hereby guarantees to deliver to said second parties during the season of 1897 not less than nine thousand (9,000) head of steers of the ages of three years old and up, and spayed heifers of the ages of four years and up; should they fail so to do they hereby agree to pay to said parties the sum of twenty dollars ($20.00) in cash for each and every head less than nine thousand (9,000) head of such cattle so delivered.

Tenth. At the end of the roundup season of 1897 the parties of the second part agree to purchase of party of the first part 500 head of saddle and work horses, at the price of twenty dollars ($20.00) per head. Said horses to be selected by parties of the second part from entire herd of seven hundred head of party of the first part and to be serviceable and sound horses. Work and saddle horses to be selected in proportion. This agreement to be binding upon the heirs, successors and assigns of both the parties thereto."

The Master found with reference to the performance of the contract (Rec. pp. 31. 32, 33): that deliveries of cattle commenced under the contract upon the eleventh day of July, 1897, and continued from time to time until the

22nd day of October, 1897, and that during that period of time 16,000 head of cattle of different ages and classes had been tendered and received; that in addition to these the respondents had received the proceeds of the sale of 148 strays; that 7,135 steers and spayed heifers, of the class described in clause nine had been delivered and that 1,865 of that class had not been delivered; that upon the 18th day of October, 1897, The Home Land & Cattle Company notified respondents by telegram (Rec. 607) that there would be delivered at Oswego, October 21st, 820 steers, 631 stock cattle and 500 head of horses.

That the defendant, The Home Land & Cattle Company upon the 21st and 22nd days of October, 1897, delivered to the plaintiffs 933 head, consisting of 820 steers and some stock cattle of the value of the sum of twenty-three thousand, three hundred and twenty-five dollars ($23,-325.00); that the defendant, The Home Land & Cattle Company was then prepared to deliver to the plaintiffs under the said contract Exhibit "A" 457 head of stock cattle, and 500 head of horses, but refused so to deliver the same or any part thereof, unless the plaintiffs first delivered to said defendants a draft for said sum of $23,-325.00 in payment for said 933 head; that plaintiffs then refused to deliver to the said defendants, or either of them, a draft for said sum, or any other sum, but offered to pay for said cattle and horses upon their delivery provided that said defendants or either of them would pay to the plaintiffs the amount due for the shortage in the number of said steers and spayed heifers under said con-

tract, at the pecified price of $20.00 per head; that the plaintiffs then presented to the defendants a statement of the accounts between the said parties, including said claim of shortage and tendered to the defendants the sum of nine thousand and six hundred and seventy-five dollars ($9,675.00) in full payment of said 933 head, and said 457 stock cattle and said 500 horses and 113 strays to-wit:

933 head at $25.00	$23,325
457 head at $25.00	11,425
113 strays at $25.00	2,825
500 head of horses at $20.00	10,000
Total	$47,575
Shortage 1,995 head at $20.00	37,900
Balance due defendants	$9,675

And that the defendants refused to accept said tender of said sum of $9,675.00 or settle said claims of the plaintiffson account of said shortage, and refused to deliver to the plaintiffs the said horses or said herd of said 457 head of stock cattle.

That the defendant, The Home Land & Cattle Company finished its roundup for the season of 1897, upon the 22nd day of October, 1897, and had not made any preparations for, and did not intend to make any further deliveries under said contract, Exhibit "A," on or before the first day of November, 1897.

That the defendant, The Home Land & Cattle Company did not have upon its range in said State of Montana on the 22nd day of October, 1897, any number exceeding

300 head of said steers of the ages of three years and up and spayed heifers of the ages of four years and up and that the plaintiffs then knew that the defendant, The Home Land & Cattle Company, could not deliver said 9,000 head of steers and heifers specified in said contract, Exhibit "A" and claimed that the shortage therein would be 1,895 head.

There is not much serious controversy in the record as to what took place on October 21st and 22nd at Oswego, although the various witnesses differ as to details. Supplementing the Master's findings, the testimony of all the witnesses concur in these facts: That when Messrs. McNamara and Marlow arrived at Oswego, they found A. W. Niedringhaus, representing the National Bank of Commerce, T. L. Blackman, who was the foreman of The Home Land & Cattle Company and Mr. F. C. Sharp, an attorney of St. Louis. A lot of cattle, consisting of the number mentioned in the telegram, was being herded some distance back of the station. At the request of Messrs. McNamara and Marlow, Mr. Blackman cut out from the herd of cattle, a train load lot consisting of 626 head, which were delivered to respondents, loaded on board the cars and shipped by respondents to Chicago. That was all of which delivery was demanded that day. The next morning at the request of Mr. McNamara a lot of 307 designed for the Poplar River Agency was delivered and received by the respondents. (See the testimony of A. W. Niedringhaus, Rec. 128-131. Blackman, Rec. 160-162; Sharp, Rec. 206-207; Marlow, Rec. 339-340; Mc-

Namara, Rec. 446-449.) We may pass by the conflict of testimony with reference to the conversation about payment for the cattle on October 21st. All agree that after the delivery of these two lots payment for them was demanded and refused, and the remaining facts took place as found by the Master.

Under the terms of the contract we contend that appellants had until the first day of November in which to make deliveries of cattle called for by their contract, and that so long as they were in good faith attempting to make such deliveries the respondents had no right either to an adjustment of damages, or to an action to enforce the contract.

The rule is well laid down in the case of

Daniels vs. Newton, 114 Mass. 530.

"To charge one for damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform *at a time when and under conditions such that he is or might* be entitled to require performance."

And this law of contracts is so clear and so well established, so preliminary and elementary, as not to require discussion or citation of authorities.

The defendants had not contracted to adjust damages under the ninth clause of the contract until November 1st, 1897, and they could not be called upon so to do upon the 22nd day of October, 1897. They had expressly stipulated in their contract that they should have until the 1st day of November to complete their contract and the plaintiffs had no cause of action for any shortage in de-

liveries until that date.

A legal remedy must be founded upon some present legal right and must conform to the nature of that right. Until the plaintiffs had either suffered loss or wrong of that which has already vested in them as of right, *or have been deprived of or prevented from acquiring* that which they were entitled to have or demand, they have no ground on which to seek a remedy by reparation.

Until the first day of November, 1897, there was nothing under the ninth clause of the contract which could be set off by the respondents to the payments due the appellants. Any liability under this clause was contingent and was a matter for future adjustment between the parties, upon a full knowledge of all the facts in the matter and one which could not possibly form, on October 22nd, a present set off upon the payments due the appellants. Until the first of November arrived the penalty provided by the ninth clause was not liquidated, so that the respondents could make such an adjustment of the damages as they attempted. It was not a thing *in esse* but rather *in potesse.* It was not a demand liquidated, existing and in being as of that time, but uncertain in amount, indefinite, merely potential and liable to occur upon the happening of certain events. It falls under the rule of law which provides that a person cannot collect a debt or set off the same until it is due, and that a contingent or prospective claim for damages is not a matter of set off in pleadings. We must consider that the act of the respondents in attempting to make this set off is to be regarded in the same light as if a set off had been plead-

ed in an action. Respondents' adjustment was to be a final winding up of the contract, a complete termination of the rights and liabilities of both parties, without any recourse to law, and that before the time had arrived as provided for by contract.

Respondents alleged and the Master found that prior to October 21st, they had been notified that on that day the "final" delivery of cattle would be made. This allegation is not supported by the evidence. McNamara and Marlow each testify that W. F. Niedringhaus told them about October 1st, that he "expected" to be ready to make delivery on or about October 14th, and that he "expected to have all the cattle in and be through by that time." This conversation did not take place about October 1st, or at the October deliveries, for the reason that W. F. Niedringhaus was in St. Louis at that time. (Rec. 77.) If it took place in September, then it could not be consided as anything more than a mere expression of opinion and not as a final decision or announcement. McNamara says that Blackman told him at Oswego that they were through gathering, but Marlow on cross-examination says that what Blackman said was, "We are through except around the bends of the river and those that have broken away." This agrees with Blackman's recollection of it. Besides this contract had been assigned to the bank and its interest therein recognized by respondents, and respondents had received notice from it of this delivery in which nothing was said about the finality of delivery (Rec. 606-608.) And they were told by Sharp that other deliveries would be made (Rec. 209.) An effort

was made to show that defendants could not have gathered any more cattle and did not intend to so gather, for the reason that their roundup outfits were being discharged. This was all immaterial. Appellants had the right to use such means as they saw fit to make deliveries until the time for such deliveries had expired, and respondents had no right to act upon an anticipatory breach until they had been informed *in unequivocal terms* by appellants that they did not intend proceeding further.

But assuming that the appellants had positively announced that they had no other steers to deliver, the inability to deliver the full nine thousand head of steers was not such a breach of the contract as would justify the respondents in withholding payment for cattle already delivered and at the same time demanding the delivery of other cattle then on hand. It seemed probable to all parties when the contract was drawn that there might be a shortage of steers, and a remedy was provided for any default in performance in that respect by the terms of the Ninth clause. McNamara knew in August that there would be a shortage (Rec. 477) and called upon the National Bank of Commerce and asked if they would make it good, to which Mr. VanBlarcom answered affirmatively. They knew it in September (Rec. 69, 102, 103) and sought to compromise it. If the fact of shortage was a breach, in the absence of the Ninth clause, acceptance of delivery after knowledge of it was an election to waive the breach as a ground of rescission of the contract.

Such is the tenor of all the cases and it is clearly laid down by the Supreme Court of the United States in

McGillin v. Bennett, 132 U. S.445, a case which dealt with a contract whose subject matter was the sale of a herd of cattle and having provisions much like the one under discussion, except that the payments and deliveries were not made in installments. The vendor stipulated to deliver 12,500 head of cattle, but from a severe winter was able to deliver only 7,646 head. On account of the cattle this fact became known to both parties. The vendee elected to accept the cattle and the Supreme Court says:

"He elected to accept what the plaintiff (the vendor) had to deliver, and must be held *to have assented to such re-adjustment of the terms of the contract as was made necessary by the changed facts.*"

Applying this to the case at bar, if the contract had not contained the Ninth clause, respondents, on discovering that the herd did not contain the guaranteed number of steers could have rescinded the contract and held the appellants for damages. This would have been their policy on a falling market. If they elected to accept the cattle then they would be bound to carry out the contract, subject to such re-adjustment as became necessary by the changed facts. What then is the effect of the penalty contained in the Ninth clause?

The contract here is a contract for the sale of a specific herd of cattle, with provisions for deliveries in installments and for payments on receipt of cattle, and containing a guaranty to deliver a specific number of steers, with a penalty attached by the Ninth clause for a failure to deliver that number. At the time of making the contract it was thus foreseen that the herd might be short

of the guaranteed number of steers and the contingency was expressly provided for. In other words, the respondents have by this contract purchased a specific herd of cattle and have obligated themselves to accept and pay for them as delivered, and have provided for themselves, in their contract, a specific remedy accruing at a certain time in the event the herd should not contain the guaranteed number of steers. Such is their contract and they are bound by it. By obtaining from the appellants a specific remedy for this contingency, they have precluded themselves from certain remedies which the law otherwise would give them. That is, when they discovered that the herd of cattle did not contain the guaranteed number of steers, they would have no right to rescind or to refuse performance on this ground. It had been foreseen and guarded against. They were compelled by their contract to accept and pay for the cattle. They must look to the penalty for relief.

Where the contract provides a penalty for the failure to do an act, the failure to do the act is not a breach, it merely liquidates the penalty.

Beach Modern Law of Contracts, Sec. 416.
Ehrlick v. Insurance Co., (Mo.) 15 S. W. 530.
Rugg v. Moore, 1 Atl. R. 320.
O'Connor v. Bridge Co., 27 S. W. 251.
McGoin v. Hen, 6 La. 729.
Spear v. Snider, 13 N. W. 910.
Stillwater v. Temple, 28 Mo., 156.

We do not mean to claim that this is an alternative contract and one which would give appellants the option

to break the contract on paying the damages. But what we do mean to say is, that when appellants have made a bona fide effort to fill the contract, and have failed through no fault of theirs, then the penalty becomes operative, and there is no breach of contract, because the contingency has been foreseen and provided against. Respondents saw fit in their contract to rely on this penalty, if such a contingency arose, and to rely on this alone. If they desired other safeguards and additional protection in making their payments they should have, at the time of entering into the contract, required of appellants a bond for its faithful performance, or they should have inserted in the terms of the contract a provision such as we find in cases like *Evans v. Ry Co., 26 Ill. 189; Miller v. Sullivan,* (*Tex.*) *33 S. W, 695,* in which cases a certain per cent of the amount to be paid on installments delivered was retained by the vendee for his protection for the future performance of the contract. This is quite a common provision in contracts. Respondents saw fit to rely on this penalty alone, which could not mature until November 1st, 1897, and they must be held to this relief alone. It was nowhere provided that if this contingency occurred the respondents would have the right to terminate the contract or to refuse payment for cattle delivered. On the contrary, the contract obligated them in the strongest words that the parties could use, to receive the cattle and pay for them on delivery. This they must do, or they themselves would commit a breach of contract. Respondents' own construction of this Ninth clause, in

exact accordance with the views above set forth, viz: that this clause did not become operative until the time for deliveries had elapsed and that they considered it a matter of future adjustment, after the deliveries were all in and paid for, is shown by McNamara's conversation with Van Blarcom, Cashier of the National Bank of Commerce, held early in August, 1897, at St .Louis, where he had gone for the express purpose (Rec. 477). McNamara asked Van Blarcom if the bank would make the shortage good under the contract, to which Van Blarcom replied that they would live up to the contract.

Assuming, however, that the inability of appellants to deliver the full 9,000 head of steers and heifers, as provided for in the Ninth clause of the contract, was a breach which would entitle the respondents to some relief prior to the first day of November, it is certain that they are not entitled to a specific performance of the contract without showing performance on their part as provided by the contract; nor are they entitled to an adjustment of damages prior to the time fixed by the contract. Respondents have proceedd upon the theory that the appellants had notified them that October 21st was a final delivery and that appellants had repudiated the contract, so far as the intention to make further deliveries was concerned. And this view of the matter is taken by both the court and the Master. We have shown, we think, that there is nothing in the evidence to support the allegation that the appellants had *notified* respondents that the delivery of October 21st was to be a final delivery.

The Master does not in terms find that the appellants had notified respondents that the delivery was to be a "final" delivery, but finds that it was in fact a final delivery, for the reason that they had not made any preparation and did not intend making any further deliveries under the contract.

A recent writer says:

"The use of the word 'repudiation' in the law of contracts is modern and though the conduct to which this name has been applied can hardly have been confined to modern times, still it is chiefly in recent cases that the legal effect of such conduct has been considered; indeed it cannot be said that he courts have even as yet worked out a consistent and logical doctrine on the subject.

By repudiation of a contract is to be understood such words or actions, by a contracting party, as indicate that he is not going to perform his contract in the future. He may already have performed in part; part performance may have already become due from him under the contract, but not have been rendered; or the time when any performance is due from him may still be in the future. The essential elements which exist in all these cases is something still to be performed in the future under the contract, which, as he has made manifest, he is not going to perform. Whether the reason he discloses for his prospective failure to perform is because he cannot or because he will not seems wholly immaterial, though the word "repudiation" is more strictly appropriate to cases where an intention not to perform is manifest, irrespective of ability. In case such repudiation of a contract is made by one contracting party, the other may frequently at least take one of two courses."

Repudiation of Contracts, 14 Harvard Law Rev. 317.

This article is by Professor Samuel Williston, Professor of Law in Harvard University, and editor of a selection of cases on Sales, and the article in question is the most complete review of the authorities on the subject under consideration of which we have any knowledge.

We may concede the correctness of the view of the majority of the courts of the United States when applied to cases in which the repudiation consists in an open renunciation of the agreement, or inability to perform brought about by the destruction or other disposition of the subject matter of the contract. We have been unable, however, to find any cases in which the strict doctrine has been applied, where the inability to perform arises out of the non-existence of the subject matter at the time of the execution of the contract, and the fact of such non-existence was equally unknown to both parties. We think it to be clearly settled by all of the authorities that where a promissee finds that his promissor is unable to carry out his promise, that he may elect to rescind the contract.

See article on Repudiation of Contracts, supra.

This principle is also embodied in the statutory law of the State of Montana, as follows:

"A party to a contract may rescind the same in the following cases only.

4. If such consideration (the consideration for his obligation) before it is rendered to him fails in a material respect, from any cause."

Civil Code of Montana, Sec. 2271.

But as to the right of the injured party to maintain an action for the inability of a promissor prior to the specific time of performance, there is a conflict in the authorities. The State of Montana has apparently adopted the principle that a repudiation of a contract does not give an immediate right of action, but gives the other party the option of treating the contract as rescinded and excuses him from offering to perform in order to enforce his right.

Civil Code of Montana, Sec. 1956, provides:

"If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same on his part, and does not retract such notice before the time at which performance on his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions on his part in favor of the former."

Under the provisions of this statute, taken in connection with the provisions of Section 2271, it would seem that in Montana a right of action is not given prior to the time at which performance of the contract is due.

Daniels v. Newton, 114 Mass. 530.

Casston v. McDonald, (Neb.) 57 N. W. 157.

Stanford v. McGill, (N. D.) 72 N. W. 938.

Clark v. Casualty Co. 67 Fed. 222.

The statute merely declared the rule as it had previously been laid down by the Supreme Court of the Territory.

Isaacs v. McAndrews, 1 Mont., 437

At the time this case was submitted to the Master the question had not been authoritatively determined in the

federal courts, but by the recent decision of the Supreme Court, in the case of *Roehm v. Horst*, *178 U. S. 1*, it is held that the rule laid down in *Hochester v. De la Tour*, *2 E. L. & B. L. 678*, would be followed in the United States Courts. That rule as declared by the Supreme Court of the United States is to the effect that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance o it, retaining his right to sue for any damages he has suffered from a breach of it; but that an option should be allowed to the injured party either to sue immediately or wait until the time when the act was to be done, still holding it as prospectively binding for the exercise of his option. If this court should take the view that in the absence of a decision thereon by the Supreme Court of Montana the interpretations put upon Section 1956 elsewhere are not binding upon the federal court, we then have the proposition established by the case of *Roehm v. Horst*, that the injured party has two remedies, either to rescind the contract, or to treat the contract as broken, with the right to bring an immediate action, or, at his option, wait until after the expiration of the time of performance. But the party who wishes to avail himself of either of these rights must manifest his election in some way and must do so without undue delay. Having once made his election, his rights are determined thereby.

14 Harvard Law Review 329, and cases cited therein.

If the respondents desired to treat the inability of appellants to deliver the 9,000 head of cattle as a breach of the contract, entitling them to a rescission, they should have notified the appellants of that fact the moment the fact of shortage became known to them. This, as we have seen, they did not do. Although they knew in the month of August, when Mr. McNamara called upon the National Bank of Commerce, that there would be a shortage, they elected to continue in force the contract and to accept and pay for deliveries made subsequent to that time (Rec. 229, 612, 613.) This action upon their part waived the breach and kept the contract alive for the benefit of the appellants, and binding in all of its obligations upon the respondents.

In Frost vs. Knight, L. R. 7 Ex., 111, quoted with approval by the Supreme Court of United States, Cockburn, C. J. lays down the rule as follows:

"The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochester v. De la Tour, 2 E. & B. 678*, and the *Danube & Black Sea Company vs. Xenos, 13 C. B. (N. S.) 825*, on the one hand and *Avery v. Bowden, 5 E. & B. 714*, *Reid v. Hoskins, 6 E. & B. 953*, and *Barwick v. Buba, 2 C. B. (N. C.) 536*, on the other, may be thus stated. The promissee, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as

his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promissee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

To the same effect is the language of Judge Taft:

"It is true that, where a contracting party gives notice of his intention not to comply with the obligations of his contract, the other contracting party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms; but, in order to enable the latter to sue on such an anticipatory breach, he must accept it as such, and consider the contract at an end. If he elects to consider the contract still in force, he cannot recover thereafter without performing all the conditions of the contract by him to be performed. These principles are well settled and there are decisions by the Supreme Court of the United States which leave no doubt upon the subject. *Rolling-Mill v. Rhodes, 121 U. S. 255, 264, 7 Sup. Ct. 882; Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850; Smoot's Cases 15 Wall, 36; Johnstone v. Milling, 16 2 B. Div. 467: Elsas v.*

Meyer, 21 Wkly. Cin. Law Bul. 346; Leake, Cont. 872, and cases there cited. As Bullock & Co. did not elect to treat the attempted cancellation by Burger and the Brewing Company of the Burger contract as a repudiation of it no right of action whatever accrued to Bullock & Co., until they had delivered the rice thereunder.

Brewing Co. v. Bullock, 59 Fed. 83.

Mr. Beach lays down the rule as follows:

"If a promisee treats the notice of intention to repudiate a contract as inoperative, he keeps the contract alive for the benefit of the other party, as well as his own, he remains subject to all his own obligations and liabilities under it and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances, which would justify him in declining to complete it."

Beach Modern Law of Contracts, Sec. 414.

Johnston v. Millen, Law Rep. 4 Ex. 112.

Reed v. Haskins, 6 E. & B. 953.

Boswick v. Buba. 2 B. N. S. 563.

Bernstein v. Meech, 130 N. Y. 354.

Zuck v. McClure, 98 Pa. St. 541.

APPELLANTS NOT IN DEFAULT.

Going back to the happenings of October 22nd, we find that the appellants had delivered cattle as set forth in the Eleventh finding, had demanded payment therefor, but were ready and willing to deliver other cattle, if paid for those delivered. And it appears in the evidence that after the respondents had made the offer of adjustment

and payment, as found by the Master, that the appellants made two separate tenders of the remaining cattle and horses to the respondents, upon the condition that they, the respondents, would pay for the cattle theretofore delivered (Rec. 210.) In other words the appellants had refused to deliver cattle on account of respondents' refusal to pay for prior deliveries, but were doing all in their power to carry out their contract. We find appellants claiming that under their contract they had until the first day of November in which to complete deliveries of cattle, insisting that under the terms of their contract they had a right to payment for cattle as delivered. The appellants at no time refused to be bound by their contract. How willing they were to be bound by its terms is shown by the two offers to deliver cattle which they had on hand after the respondents had refused them payment for the cattle delivered except upon their own terms. It appears in the evidence that at the time the cattle were seized by respondents on the 23rd of October, the appellants had held these cattle in the hope that respondents would retract their decision and go on with the contract.

Sharp testifies that on the morning of the 23rd he went, on first getting up in the morning to see Blackman, because the cattle were being held on the hills, so if McNamara and Marlow changed their minds they (appellants) would be in a position to go on with the contract. And in addition to this, VanBlarcom of the National Bank had expressly told McNamara that they would

stand by the shortage clause and would be bound by it. Everything goes to show that the appellants were ready and willing to abide by the contract.

The appellants claimed and were right in their contention, that the Ninth clause of the contract gave them until the first day of November to perform and until that date expired they owed the respondents nothing; and in view of the fact that an adjustment of damages under the Ninth clause of the contract depended upon facts not in the knowledge of either party, such as the number of cattle that remained to be delivered and the number of strays, surely the appellants could in all reason claim that such an adjustment was a matter for future consideration and not one which the respondents had a right to make upon the 22nd day of October. Respondents could not say in reply to appellants' demand for payment, "Because you will owe us something by and by, we will hold what we owe you until that time occurs." Such was not the contract and they had no such right in law. It is clear that under the findings of fact by the Master and under the evidence in this case the appellants were not in default and that they were delivering cattle constantly under the contract and had cattle on hand to deliver. The fact that a time was approaching when they would be unable to deliver more cattle did not affect their position. They were not in default.

Neither would the insolvency of The Home Land & Cattle Company, assuming it to have existed, (and the Master has found that it was solvent) constitute a breach

of the contract, justifying non-performance on the part of respondents. The contract had been assigned to one able and willing to carry it out and the assignment recognized.

Pardee v. Kanaday, 100 N. Y. 121.

Hobbs v. Columbia Falls Brick Co., 31 N. E. 756.

This assignment became binding upon the National Bank of Commerce and bound it to carry out the terms of the contract.

Civil Code of Montana, Section 2134, provides:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known, to the person accepting it."

RESPONDENTS' DUTY TO MAKE PAYMENTS CONCURRENT WITH DELIVERIES.

By the express language of the contract, as we have shown above in our quotations from the contract and which we will not here repeat, payments were to be made concurrent with deliveries. Under the first clause the stock cattle were to be delivered in train load lots, but the only requirement in regard to the delivery of the steers and spayed heifers is that they are "to be delivered and counted at the same points when marketable for beef, in the opinion of said parties of the second part." There was no provision in the contract requiring appellants to deliver a specified number of steers at each delivery. They could deliver any reasonable number, call upon respondents to accept them and demand pay-

ment therefor, which by their contract respondents were then obliged to make.

McNamara himself testified that he had no control over the number of cattle which appellants could call a delivery. That the appellants could fix any number they saw fit, and he was bound to receive them. He says, "That was all I ever had to do with the cattle, take what they would give." (Rec. 593-4-596.)

And it clearly appears in the testimony that respondents did not claim to exercise any control over the cattle being held at delivery points by defendants. Thus appellants could take one thousand cattle to Oswego, deliver to respondents five hundred head of them on, say August 1, 1897, and if they saw fit hold the other five hundred there until August 10th, or for that matter until November 1st, and then call upon respondents to accept them. This was one of the rights given them by the contract. Because they had collected a thousand head of cattle at a point, they were not bound to deliver them all at one time. And when they had delivered the five hundred cattle, they were entitled to demand and to be paid for them under the contract. In other words, appellants had a right to fix the number of cattle to be delivered at any one time. The contract did not require them to deliver all they could gather together, or all respondents could receive, but only as many as they saw fit to deliver.

Applying this to October 22nd, 1897, we see that appellants could lawfully hold the 457 head of cattle and the horses at Oswego, until November 1st, 1897. They were

not required to deliver them October 22nd. They could deliver them on that day or not, as they chose. The respondents had expressly bound themselves to pay for the cattle as delivered and this they must do. The sole thing which could justify the respondents from performing their part of the contract would be the actual refusal of the appellants to deliver any cattle under the contract. It was nowhere provided in the contract that respondents could hold back a payment or any part thereof. Such an act would be a failure to perform on respondents' part. Supposing before the first delivery had been made under this contract respondents had counted appellants' cattle, as far as able, and had concluded that the shortage of steers and spayed heifers was 2,000 head, could they refuse on this ground to accept or to pay for the first delivery of cattle tendered them by the appellants? We contend not, for the reasons given above, viz: that such a contingency was foreseen and provided against in the contract. Could they then refuse to accept that delivery of cattle and yet not commit a breach of contract unless appellants permited them to deduct the estimated shortage under the Ninth clause of the contract? We think clearly not. And would not such a refusal at any time be such a breach of the contract on their part, as if made in the commencement thereof? The answer to this question is clear. The respondents were bound by the strongest words possible to use in contracting to accept and pay for the cattle as delivered. Until the appellants were actually in default, the re-

spondents were bound to carry out the terms of the contract.

Coming down to October 21st, there had been no breach of the contract on the part of appellants and no notice of any intention to abandon it. A train load lot of cattle had been delivered and received, for which payment was not made, and on the morning of the 22nd a lot, of the size demanded by respondents, had been delivered and not paid for. Had appellants the right to demand payment at the time they did and upon its refusal had they the right to refuse to go on with the contract?

It is immaterial whether or not Albert Niedringhaus told McNamara on October 1st that he would have to have drafts upon delivery. The contract called for them. The evidence is quite clear upon the subject, however, notwithstanding the pretended denial of it by both McNamara and Marlow, for in addition to appellants' testimony, Marlow says: "We knew from the power of attorney that Albert was to deliver cattle and receive drafts," and I heard Albert say when Mac gave him the receipt the night before, "We can fix this up in the morning Mac, when you get these other cattle that are to be delivered." (Rec. 370.) There was nothing to fix up but to issue a draft for the cattle received. Was there such a delivery as called for payment? Respondents pretended to claim they were entitled to all of the cattle then being held, before a draft was to be demanded. The contract, it seems to us, is plain upon the subject. Respondents attempted to construe it their way at the

start, but in August, VanBlarcom wrote that drafts must be issued upon deliveries, (Rec. 228), and always after that letter they were issued. (Rec. 417 et seq.) Nowhere is there any evidence of waiver of this provision. Marlow attempts to define what he understood by the words "complete delivery," or "entire delivery," as being "all the cattle they got on one trip," but the Master sustained objection to this upon the ground that the parties had defined by their contract what a complete delivery was. (Rec. 334.)

On the 26th of August, W. F. Niedringhaus told McNamara that he would have to have drafts after each day's delivery. (Record 490.)

And McNamara told W. F. Niedringhaus that he was prepared to make drafts as Niedringhaus wished after each day's delivery.

There need be no controversy about what took place on October 21st and 22nd. All of the parties agree that cattle were delivered on those days, which were not paid for. Appellants demanded payment for the cattle delivered before making further deliveries. If the respondents wished a further performance it was then their duty to make the payment demande.d Section 1955 of the Civil Code of Montana provides as follows:

"Before any party to an obligation can require another party to perform any act under it he must fulfill all conditions precedent thereto imposed upon himself, and must be able and offer to fulfill all conditions concurrent imposed upon him on the like fulfillment by the other party."

But respondents refused to make the payments or any payments. Instead they made the offer set forth in the Eleventh finding of fact.

RESPONDENTS COMMITTED A BREACH OF CONTRACT.

By their action in refusing to pay for a delivery of cattle or to pay for any cattle thereafter delivered, except on their own terms, respondents attempted to insert a new term in the contract, a condition to which appellants were not obliged to submit, so long as they were without default.

In the case of *Stephenson v. Cady, 117 Mass. 6* three contracts were entered into for the delivery of yarn. Delivery was commenced under the first contract and part of the installment delivered; and the delivery under the third separate contract was completed. By the terms of the contract the defendant, who was the seller and manufacturer of the yarn to be delivered, was to draw on the plaintiff as the deliveries were made. Certain deliveries were made on November 27th and 28th under the first contract and defendant drew three drafts upon the plaintiff covering the yarns delivered. The last draft, one for four hundred dollars, the plaintiff refused to accept. On December 1st, the defendant's mill in which the yarns had been and were expected to be manufactured, burned down. Thereupon plaintiff wrote defendant that he expected to hold the defendant to his contract, and made demand for the rest of the yarn, and said that he had not paid the draft for four hundred dollars upon

the ground that he held it as security for the performance of the contract. The defendant answered that he was under no legal obligation to fulfill the contracts, inasmuch as the plaintiff had violated them by refusing to accept or pay the draft for four hundred dollars. Defendant made no further deliveries of yarn. It was held that the contract was properly rescinded by the defendant. The court says:

"This is an action to recover damages for the defendant's refusal to perform the contracts declared on. The defense is that the plaintiff, himself, failed to perform his part of the agreements.

The three contracts were made on three different days, for the delivery of given quantities of yarn at a price named to be paid for on delivery. Part deliveries were made from time to time under the first and last contracts, and all those deliveries except the last were paid for at the time. By the terms of the second contract the deliveries under it were to commence when the quantity required by the first had all been shipped. And the question whether the plaintiff can recover anything for refusal to deliver under the second contract depends therefore on whether the conduct of the plaintiff justified the defendant's refusal to perform the first.

All the contracts are executory agreements for the sale of goods to be thereafter manufactured in the defendant's mill; they contain stipulations which impose upon one party the obligation to deliver, and upon the other the obligation to pay on delivery, and which are to be regarded as concurrent and mutually dependent conditions. Neither can maintain an action for the neglect and refusal of the other, without showing performance or its

equivalent on his part. Payment must keep pace with delivery. The natural construction of the contracts, as applied to the subject matter, implies that the goods were to be delivered as they were manufactured from time to time. And this construction is confirmed by the course of dealing, the deliveries and payments, and the settlement between the parties.

The case was tried by the court without a jury, and we are of opinion that the refusal of the plaintiff to pay for a delivery of yarn which had been made under the contract, 'unless the defendant would give security for the entire fulfillment of the contract,' was, under the circumstances disclosed sufficient to warrant a jury in finding the defendant justified in treating the contract as abandoned by the plaintiff, and as ended in its unfulfilled obligations upon him. It was a refusal to execute a substantial part of the agreement; an attempt, by holding on to the property without payment, to impose an onerous condition not contemplated by the original contract, and to which the defendant was not required to submit, so long as he was without default. It was something more than a refusal to pay for a single delivery. It was broad enough to be treated as a general refusal to make any further payments. It was prospective in its character, and was made with notice that such refusal would be regarded as releasing the defendant from all obligation to fulfill. Conduct less decisive has been held to justify nonperformance by the other party to the contract."

In *King v. Faist, 161 Mass. 449,* by the terms of a contract for the sale and delivery of a quantity of flour, the vendor was to ship the flour specified as the vendee might direct, drawing upon him demand drafts for the flour

shipped, and the vendee was to take out the flour by a certain date and to honor the drafts. A month before the time limited for withdrawing the flour, the vendee wrote to the vendor, "Before we pay any more drafts we want some assurance from you that you will make good any claims on account of quality," and stated orally to the agent of the vendor that he would pay no future drafts without some guaranty to protect him in case flour should on arrival prove deficient in quality and he returned a draft of the vendor unpaid. The vendor thereupon wrote: "We are not going to send any more flour." Held, that the vendor had a right to rescind the contract, the vendee having without justification declared his intention not to perform it, and that the letter of the vendor was an effectual rescission and released him thereafter from all obligation under the contract to deliver the flour. An action was instituted to recover damages for non-performance of the contract, and it was held that the plaintiff could not recover.

The case at bar is much stronger than the case of Stephenson vs. Cady, for the reason that the respondents refused to make payment for a delivery of cattle at a time when appellants were entitled to payment and at a time when they had more cattle to deliver under the contract, even admitting that these deliveries of October 21st, 22nd and 23rd were to be the last deliveries under the contract, a fact which we do not admit, as the evidence shows appellants intended to round up such steers and cattle as they could in the vicinity.

We think there can be no serious contention that respondents' refusal to pay for a delivery of cattle, when there were other deliveries to be made, constituted a breach of contract evincing their intention to be no longer bound by the terms of the contract, and justifying appellants in abandoning further performance. Non-payment is a clearer element of intention than words or circumstances, and a party is entitled to go on or cease carrying out a contract, according to what the other party actually does, not what he says he will do, or what he says his intention may be. There is no difference between non-payment and non-delivery in an installment contract. Both are acts and should be given more consideration than declared intentions.

Phillips Co. v. Seymour, 91 U. S. 646.
Stockdale v. Schuyler, 8 N. Y. S. 813.
Stephenson v. Cady, 117 Mass. 6.
King v. Faist, 161 Mass. 449.
Fletcher v. Cole, 23 Vt. 114.
Withers v. Reynolds, 2 Barn. & Ad. 882.

We think the weight of authority in this country leans to the side of reason and maintains the rule that the failure of a buyer to pay for an installment is a breach going to the essence of the contract and justifies the seller in refusing to proceed further.

Section 1955 Civil Code of Montana.
Hayes v. City of Nashville, 80 Fed. 641.
Wharton v. Winch, 140 N. Y. 287; 35 N. E. 589.
Bowdish v. Briggs, 39 N. Y. S. 371.
Ferris v. Wilson, 19 N. Y. S. 209.
Cunningham v. Ry. Co., 18 N. Y. S. 600.

Kuler v. Clifford, (*Ill.*) *46 N. E. 248.*
DeLoam v. Smith, (*Ga.*) *10 S. E. 436.*
Robson v. Bohn, *27*, *Minn. 333.*
Evans v. Ry. Co., *26 Ill. 189.*
Armstrong v. Coal Co. (*Minn.*) *49 N. W. 235; 50 N. W. 1029.*
Miller v. Sullivan, (*Tex.*) *35 S. W, 695.*
Gardner v. Clark, *21 N. Y. 399.*

The seller's refusal to make further deliveries until he had been paid for the last installment is not a breach of the contract.

Raabe v. Squire, *148 N. Y. 81; 42 N. E. 516.*

Defendant, in an action on a contract, cannot defeat recovery on the ground that the contract was entire, and that plaintiff did not fully perform it, where plaintiff's failure was caused by defendant's refusal to carry out his part of the contract.

Bowdish v. Briggs, *39 N. Y. S. 371.*

If the interpreted contract demands successive steps, now a step by one party, then a step by the other; whenever on the one side all is done which precedes performance on the other, the party on the other side breaks the contract if he simply neglects to take his step, though no demand on him is made.

Bishop on Contracts, *Sec. 1434.*

The doctrine laid down in *Mersey Co. v. Naylor*, *9 App. Cases 444*, is that failure to pay for an installment is not such a breach of the contract as entitles the vendor to rescind, unless it shows an intention to be no longer bound by the contract.

This doctrine is opposed to reason, as we have shown

above, and is not adhered to, closely even in England. Payment is impliedly a condition concurrent to obligation to deliver and a refusal to pay on delivery in a substantial breach and justifies the vendor in his refusal to further perform.

Mr. Benjamin in his work on Sales, after stating the doctrine of England to be that a default in paying the price would not justify an action for rescission of contract, unless the right be expressly preserved, which doctrine seems to be laid down by Mersey Co. vs. Naylor, inquires, "Can the seller rescind for default of payment?" and he says, "We have already seen that the right of the seller to rescind for default of payment is recognized in the American decisions, where the property is still in the possession of the seller, or it is delivered in expectation of immediate payment, which is not made. See Ante Sec. 335 et seq., Solomn vs. Hathaway, 126 Mass. 429; Hickox vs. Hoyt, 33 Conn. 553."

2 Benjamin on Sales, Sec. 1125, note 7.

Section 335 and the sections following treat the effect of payment in passing title to the property, and numerous cases are cited in which it is held that the seller may elect to keep the property as his own on default of payment, unless he has waived his right so to do; and by the cases cited it is apparent that this rule applies to sales to be paid for by promissory notes, or by cash, and that, where by the contract itself no time is fixed, the law implies that the payment is to be made in cash on delivery of the article sold.

But in any event, as said in Clark on Contracts, page 660.

"The courts are agreed that if a default in one item of a continuous contract of this nature is accompanied with an anouncement of an intention not to perform the contract upon the agreed terms, or, what amounts to the same thing, if the failure to perform is deliberate and intentional and not the result of inadvertance, or inability to perform, the rule we have been discussing does not apply. The other party, under these circumstances, may treat the contract as being at an end."

And in this case, the action of respondents clearly brings it within this rule, for it was deliberate and intentional, and plainly showed an intention to be no longer bound by the terms of the contract.

APPELLANTS NOT REQUIRED TO RESCIND.

The court held that this was not a severable contract, and seemed to be of the opinion that the appellants had lost some of their rights by failure to demand a rescission of the contract. But the court evidently labored under a misapprehension of the situation. The appellants were under no obligations to rescind for non-payment. They were not required to do anything but to refrain from performing and when sued plead the non-payment as a justification. This principle is recognized by Judge Taft in the case of *Cherry Valley Iron Works v. Florence Iron River Co. 64 Fed. 569*, the case relied upon by Judge Knowles. Besides the distinction between rescission and non-performance, as here contended for, has been recognized by the Supreme Court of the United

States as well as the Federal Circuit Courts.

The question is fully discussed in the case of *Hayes v. City of Nashville, 80 Fed. Rep. 641*, where the following language is used:

"It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made so far as that is possible, and that no rights accrue to either by the terms of the contract. But besides technical recission, there is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under is terms for the breach which gave him the right of abandonment. In Mining Company vs. Humble, 153 U. S. 540, 541, 14 Sup. Ct. 876, 879, defendant excepted to the following instructions of the trial court: 'If the jury find from the evidence that the plaintiff were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance, to such an extent as to render the performance of it difficult and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal, and would have justified the plaintiffs in abandoning the contract and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract.'

In sustaining the correctness of the charge the Supreme Court, speaking by Mr. Justice Brewer, said:

'It is insisted, and authorities are cited in support thereof, that a party canont rescind a contract, and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule—and it lays that down correctly—which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a recission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. Generally speaking it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party; and if such other party interferes—hinders and prevents the doing of the work—to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for damages which it has sustained by reason of the non-performance which the other has caused.'

It very frequently happens that laymen do not distinguish between these two ways of ending a contract, and, therefore, that words are used by a party which, literally and strictly construed, would effect a complete rescission and destruction of the contract, when the party's real in-

tention is only to declare his release from further obligation to comply with the terms of the contract by the default of the other party, and his intention to hold the other for damages. In such cases courts consider, not only the language of the party, but all the circumstances, including the effect of a complete rescission upon the rights of the parties, and the probability or improbability that the complaining party intended such a result, in reaching a conclusion as to the proper construction of the language used."

III.

RESPONDENTS NEVER TENDERED PERFORMANCE.

Assignments of Error numbered Fifteen and Sixteen attack the rulings of the court and Master upon the sufficiency of the tender of performance made by the respondents on the 22nd day of October.

Civil Code of Montana, Section 2029 provides as follows

"An offer to perform must be free from any conditions which the creditor is not bound on his part to perform."

Section 2021 is to the effect:

"An offer of partial performance is of no effect."

It is not in the nature of a tender to make conditions, terms or qualifications, but simply to pay the sum tendered as for an admitted debt.

Wood v. Hitchcock, 20 Wend. 47.

Brooklyn Bank v. DeGraw, 23 Wend. 342.

Eddy v. O'Harra, 14 Wend. 21.

The offer of the respondents fails to fulfill any of these conditions. It is not absolute and unqualified. The ap-

pellants had delivered cattle for which they were entitled to payment. The respondents refused to pay for a delivery of cattle. They made a tender of payment, which was no tender in law, because they attached thereto conditions not contemplated by the contract. They took the law into their own hands and attempted to make a full adjustment of any damages they might suffer. We do not see how it can be contended respondents' offer was an offer made in compliance with the contract.

We contend that respondents should have made on October 22nd, 1897, a tender of the exact amount due appellants for cattle delivered, before they were entitled to have any more cattle delivered them, or before they could claim any rights under the Ninth clause of the contract. If they had made such an offer of payment and the appellants had refused to accept it and to complete the deliveries, then and then only would the appellants have been in default under this contract. As a matter of fact if they had made such an offer, the evidence clearly shows appellants would have accepted it, and would have gone ahead with their contract and this controversy never would have arisen.

We claim, and we think rightly, that respondents' offer of performance was no offer, because,

(1) There was no liability under the Ninth clause of the contract until November 1st, 1897.

(2 At the time respondents made their offer appellants had other cattle on hand to deliver and the deliveries were not complete.

(3) Appellants were entitled to claim the full contract time, that is until November 1st, 1897, in which to make deliveries and after delivering the 500 head of horses were entitled to use the 200 remaining head or round up steers on the river banks and elsewhere, as the evidence shows it was their purpose to do, and were entitled to the time remaining between October 22nd and November 1st, in which to do this.

(4) The exact number of strays shipped to the market was not known and the offer was inexact as to this.

(5) Appellants had a right to claim that the provision in the Ninth clause was a penalty under the law and that they could not be compelled to pay the full amount named, that is, $20.00 per head for shortage, but that they were liable only for actual damages suffered by the respondents.

(6) That in determining the actual damages they were entitled to consider any change which might occur in the market between October 22nd and November 1st and that respondents could not arbirtarily bind them to the date October 22nd.

NINTH CLAUSE VOID.

The amount tendered by the respondents to the appellants in payment for cattle delivered and to be delivered on October 22nd, 1897, was ascertained after computing the value of the steer shortage at the rate specified in the Ninth clause of the contract. But this Ninth clause of the contract is void, in so far as it fixes a rate of compensation, because it attempts to determine in anticipation

of a breach of the contract, the compensation to be made therefor, and the respondents would only be entitled to set off against the shortage the difference between the market value of the cattle and the contract price at the time they were to be delivered.

Civil Code of Montana provides as follows:

Section 2243. Every contract by which the amount of damages to be paid, or other compensation to be made for a breach of the obligation is determined in anticipation thereof is to that extent void, except as expressly provided in the next section.

Section 2244. The parties to a contract may agree therein upon the amount which shall be presumed to be the amount of damages sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damages."

These sections of the Civil Code were taken from the Civil Code of California, after the decision in the case of *Pacific Factory Co. v. Adler, 90 Cal. 110; 22 Pac. Rep. 36.*

We might well rest our contention as to the validity of these sections and their application to the present controversy, upon this decision. In that case the Supreme Court of California held that a contract for the sale of grain bags providing a penalty of three cents for each bag which the vendor refused to deliver, was void, such contract not presenting a case where it would be extremely difficult to determine the damages. But these sections did not incorporate into the law of Montana any new feature or principle. They simply announced the doctrine, well settled before by the decisions, as to the dif-

erence between a penalty and liquidated damages. Long before the passage of these sections of the statute, courts had refused to regard a specified sum agreed upon by the parties as liquidated damages, as the measure of recovery, regardless of the actual amount of loss or damage sustained by the breach of the contract, and this, too, without regard to how the parties themselves had stipulated, or by what name they had described the sum thus to be paid in this contract. It might be called "liquidated," "stated" or "stipulated" damages, or a "penalty," but naming it thus did not make it so, and courts disregarding these terms inquired as to whether in fact the damage could be ascertained, or whether it was extremely difficult to fix the just measure of compensation for the breach of the contract in each particular case.

An interesting note upon this subject is found appended to the case of *Graham v. Bickham, 1 Am. Dec. 328-331*, and an examination of the authorities there cited will aid us in determining whether the twenty dollars per head specified in this contract is to be regarded as a penalty under Section 2243, or as liquidated damages, and thus falling under the provisions of Section 2244 of the Civil Code.

In Estley vs. Weldon, 2 Bas. & P. 346, the defendant entered into an agreement to perform at the plaintiff's theatre for a stipulated price, and a clause was inserted that if either party neglected to perform his agreement he should pay $250 to the other. Here on the one side was the contract of an actor to perform, and on the other side of the manager to pay a stipulated price. The de-

fendant, who was the actor, refused to perform, and here was a case where it might seem that it would be "impracticable or extremely difficult to fix the damages." But the court held it to be a penalty merely, and that plaintiff could only recover his actual damages.

Kimball v. Farren, 6 Bing. 141, is a similar case. In this case there was a clause in the agreement which read that if either party failed to fulfill his agreement or any part thereof, or any stipulation therein contained, such party should pay the other the sum of one thousand pounds, to which sum it was agreed the damages should amount, and which sum was declared by the parties "liquidated and ascertained damages and not a penalty or a penal sum or in the nature thereof." The defendant having refused to act, his manager sued him and recovered damages in the sum of seven hundred and fifty pounds. A motion to increase it to one thousand pounds was denied.

In *Davis v. Penton, 6 B. & C. 216,* there was an agreement to sell a stock and good will of a business and the vendor agreed not to carry on business within five miles of the house wherein the stock sold was situated. There was also an agreement on the part of the vendee to take certain furniture and fixtures in connection with the sale thus made, at a price to be thereafter fixed, and each party bound itself in the penal sum of five hundred pounds, to be recoverable for the breach of the agreement, and by way of liquidated damages. It was held to be a penalty merely, to secure such damages as the in-

jured party ought to receive. This case shows the reluctance with which courts treat stipulations of this kind as liquidated damages, and their strong inclination to regard them in every case as merely a penalty. The plaintiff in this case had covenanted to pay two notes, one for four hundreds pounds and one for £170.4, and the test applied by Bailey J. in determining whether the sum named was to be treated as a penalty or as liquidated damages was, that where it was to be regarded as security for the performance of several acts and it appeared that in some instances it was too large and in others too small, it would be treated as a penalty. He says:

"It could not have been intended here to fix the sum of £500 as a maximum, if nothing was paid in respect to either of these bills, for in that case the party would be entitled to receive £570.4; in that case £500 would be too small a compensation for the breach of the agreement. On the other hand if the £400 had been paid and that for £170.4 alone remained unpaid, the £500 would much exceed a fair compensation for the breach of the agreement."

It is to be remembered that here the plaintiff was suing the defendant for going into business within five miles of where the business he had sold was located, and the defendant answered, pleading by way of justification, that the plaintiff had executed these two notes, as a part consideration for the purchase price, and had not paid them.

In *Sainter v. Ferguson*, 7 *C. B. 716*, there was a case somewhat similar in its facts to the one last cited. The defendant had agreed not to practice as a surgeon or apothecary at Maclesfield, or within seven miles thereof

under a penalty of £500. Here was a case like the case of plaintiff in Davis vs. Penton, where it was "impracticable or extremely difficult to fix the actual damage," but the contract in this case was unilateral, and the court held that although the word "penalty" was used, it was in reality liquidated damages.

A good illustration of liquidated damages is the case of *Lowe v. Beers, 4 Burr, 2225*, where the defendant stipulated to pay the plaintiff £1,000 if he should marry anyone else but her. Here was a case where it was clearly "impracticable to fix the actual damage."

Mr. Proffatt in the note already referred to says:

"An examination of the cases in this country will show that the principle of construction deduced from the English authorities cited are followed with perhaps a greater inclination to regard the sum named as a penalty. Thus Shaw J. in *Shute v. Taylor, 5 Metc. 67*, says: 'In general it is the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages, because then it may be apportioned to the loss actually sustained.'"

An illustration of this is *Bagley v. Peddie, 16 N. Y. 469.* This was an action brought to recover damages for the non-performance of articles of agreement by which, among other things, the defendant was to serve the plaintiff according to the best of his ability in the business of making gold pens and not disclose any of the improvements or inventions of the plaintiff in the business; that he would attend faithfully to all things entrusted to him,

not embezzle or purloin any money or goods and that he would render a true account of all things committed to his care whenever the plaintiff should require it. Three thousand dollars was named in the instrument for liquidated damages for breach of the contract. No special damages being shown the plaintiff was non-suited. Shanklin J., in rendering the decision of the court on appeal, says:

"Although the courts have uniformly conceded to parties the right to fix the amount of damages in advance of the breach of the contract, and at any sum however disproportioned to the real damages they shall see fit, and have likewise conceded that it is a question of intention to be derived from the scope and tenor of the agreement, yet when the judicial mind has acted upon this class of cases, it is evident how repugnant it has been to enforce them according to the express language of the contracting parties. Hence have sprung up a series of artificial rules peculiar to contracts of this character, which, while they ostensibly profess to comply with the fundamental canons of construction appertaining to legal science, contrive to contravene them by artificial distinctions and limitations."

The judgment of the court below was reversed, for the reason that it was held to be difficult to prove the actual damages the plaintiff would sustain by the defendant leaving his employ and revealing to others the secrets of his trade.

While it is true, as stated by the Judge in the foregoing opinion, that courts have uniformly conceded to parties the right to fix the amount of their damages in ad-

vance, it is obvious that under the provisions of our Code Sections 2243 and 2244 this right has been taken away, except in the cases provided for in the section last named, which, when we come to consider the decided cases, covers about all of the cases in which the courts have heretofore allowed such a stipulation to be enforced.

In *Maxwell v. Allen, 2 Atl. 386,* one partner agreed in writing to sell to his co-partner his interest in a store and stock of goods, good will of the business, etc., and a forfeiture of $500 was stipulated against either party who should break the contract. The court held that this was to be regarded as liquidated damages, and says: "The good will of the business was an element of value not easily measured."

In *Keeble v. Keeble, 5 So. 149,* the party being employed as a business manager in a store, entered into a contract to keep sober and abstain from the use of intoxicating drinks during the term of his employment, agreeing to pay as liquidated damages the sum of $1,000 in case he violated his agrement. He became intoxicated and remained so for a long time, injuring the business. It was held that this was a case of liquidated damages and not a penalty, the court holding that it was a case where the damages were uncertain, fluctuating and inacapable of easy ascertainment.

In *Tennessee Mfg. Co. v. James, 18 S. W. 262,* a minor was employed in a cotton mill. By the terms of her employment if she quit without giving two weeks notice she was to forfeit ten dollars of her wages. The court

in rendering its decision quoted with approval from Sutherland on Damages, 490 to the effect that: "the tendency and preference of the law is to regard stated sums as a penalty, because actual damages can then be recovered and the recovery limited to such damages." The court, however, in the case at bar held that it was one of liquidated damages, inasmuch as the work in a cotton mill was divided into many departments, one dependent upon the other, and that there was no ready means of estimating the loss which would occur in the various departments by reason of a skilled operative quitting without the requisite notice being given.

In *Fasler v. Beard*, (*32 Minn.*) *38 N. W. 755*, an agreement had been entered into by which the defendant had covenanted to cause a certain mortagage appearing of record, as an incumbrance upon certain lands, which he had sold to the plaintiff, to be discharged within one year's time, and in case of his default damages for the breach of such covenant were fixed and stipulated at the sum of $500. The court held that it was a case of liquidated damages, the injury in question being uncertain in itself and insusceptible of benig reduced to a certainty by legal computation.

The cases cited sufficiently show the class of cases wherein, in the language of Section 2244, it would be "impracticable or extremely difficult to fix the actual damage." It will be noted that none of these cases were cases of the sale of ordinary personal property, such as stock or beef cattle.

Upon the decision of the demurrer in this case the court held that it was a question of fact to be determined from the evidence, as to whether the amount of damages sustained by the respondents could be ascertained. The question was submitted to the Master and in his Sixteenth finding, he finds the increase in the value of cattle during the season of 1897 to be $5.00 per head, so that the exact amount of damages that the respondents would suffer not only could be, but has been, ascertained. This provision of the Ninth clause was therefore a penalty and even if the respondents' offer of payment could be upheld on other grounds, they would have the right to deduct from the amount due for cattle delivered only the amount of their damages. On this ground alone their tender of payment was insufficient, and the Court should have so held.

IV.

NO RIGHT TO SPECIFIC PERFORMANCE.

The Twelfth, Thirteenth, Eighteenth and Twentieth Assignments of Error present the question of the jurisdiction of the court to specifically enforce the contract in suit by requiring the delivery of the stock cattle which appellants had on hand October 23, 1897. This contract was one for the sale and delivery of personal property, viz cattle. The appellants did not agree to deliver any specific number of stock cattle during the year 1897. The guaranty as to number referred only to beef cattle. It will thus be seen that the court in decreeing the delivery of stock cattle is only doing so to enable the respondents

to set off against the purchase price of one class of cattle, the damages sustained by failure to deliver another grade. We have been unable to find any authority for this use of the power of a court of equity.

Contracts for the delivery of personal property are not usually enforceable specifically, for the reason that ordinarily the breach can be compensated by damages. Hence articles of such character that their market value is easily ascertainable and as are found in the ordinary market, cannot be made the basis of equity consideration.

Pomeroy Equity Jurisprudence, Sec. 1402.
22 Am. & Eng. Ency. Law, p. 991.
Scott v. Bilgerry, 40 Miss. 119.
Ferguson v. Paschal, 11 Mo. 267.

A complainant cannot maintain a suit in equity to enforce the specific performance of a contract, where he has a complete remedy at law.

Beach on Modern Law of Contracts, Sec. 879.
Smith v. Gas. Co., 154 U. S. 557.

In this case there are no grounds upon which a specific performance of the contract can be had. The finding of the Master clearly shows that the amount of the advance in cattle could be easily determined and is definitely fixed in the finding. Finding Seventeen to the effect that the plaintiffs depended upon these deliveries of cattle to furnish cattle for its beef contract with the Government Indian Reservation, and finding Eighteen that they had provided hay and provisions to winter stock at their ranch are not sufficient to justify the specific performance

of this contract, for the reason that there is no finding that the damages arising under either of these could not be compensated at law. And in regard to the Indian contract, McNamara testified that he had plenty of cattle of his own to fill these contracts and could have filled them from his own cattle at a loss of about two dollars per head, over what it would cost him to fill them with the cattle involved in this case.

Their action for specific performance in this case is thus wholly unsupported by the evidence and it clearly appears that they had a very adequate and complete remedy at law. If they did not, the burden of proof was upon them to show this fact fully and clearly. Under the head of "Relief" in our Civil Code, occurs the following provision:

"It is to be presumed that the breach of an agreement to transfer personal property can be adequately relieved by pecuniary compensation."

Civil Code of Montana, Sec. 4413.

In addition to this we might say that the contract is not one that can be specifically enforced, for the reason that it contains a penalty for the breach thereof.

Beach Modern Law of Contracts, Sec. 879.
O'Connor v. Tyrrell, 30 Atl. 1061.
Hahn v. Concordia Society, 42 Md. 460.
St. Mary v. Stockton, 8 N. J. Eq. 520.

In the latter case the Chancellor says, page 531:

"Again by the agreement of sale and purchase in this case, a certain sum is agreed, fixed upon and stipulated as a liquidated satisfaction to be made and paid in case

of breach of said agreement by either party, to the other performing. The parties have fixed their own measure of damages for the breach of the agreement; and whether the sum from its amount, five thousand dollars, should be considered by this court as liquidated damages, or only in the nature of a penalty, which I have not now the means of determining, this provision of the agreement shows that each party contemplated a resort to an action at law for damages in case of the failure of the other to perform his part."

Under the provisions of the statute if the damages arising from the failure to deliver the 9,000 head of steers could not be easily ascertained, then the agreement to pay $20 per head became operative. If they could be easily ascertained then a judgment therefor would be compensation. In the case at bar they not only could be, but have been ascertained, and that too from respondents' own testimony.

It is difficult to perceive upon what theory the court ordered a decree in the case. In the opinion the court seems to confuse the parties. He says (Rec. 58) The Home Land & Cattle Company had no right to demand payment, because the money had been assigned and that the Bank had no control over the cattle. The Cattle Company was not demanding payment, because the power of attorney came from the Bank, whose rights in the matter had been recognized by respondents. Again the court says it was not right for the Company to demand payment to another, when the result of this payment would render it impossible for respondents to re-

cover damages in this jurisdiction. But this was not the fault of the Company and this state of things existed when the contract was first entered into and when it was assigned to the bank. The respondents knew when the contract was made that they were buying all of the valuable assets of the Company in Montana, and that if an action for damages was to be brought, they would have to go elsewhere to satisfy the judgment. They also knew when the assignment was made to the Bank that the money was to be paid to it; and they went to St. Louis to ascertain whether or not the Bank understood that it was assuming the obligations of the contract, and after an affirmative response, they elected to proceed with the contract. That election bound them, and insolvency of the Cattle Company became an immaterial element in the case. This phase of the case was entirely ignored by the trial Judge and hence his error. The case cited by him, *Johnson v. Brooks, 93 N. Y. 343*, is illustrative of the class of cases in which a court of equity will decree specific performance of a contract for the delivery of chattels in cases of insolvency. It will be noted that in that case the plaintiff had paid the entire consideration for the stock of which delivery was sought. In such cases, if delivery is not enforced, the party gets nothing. But in the case at bar the respondents had not paid the consideration for the 451 head. They had not even paid for cattle which had been delivered, nor tendered the amount due therefor. Hence insolvency, if it existed, was not a ground for specific performance, although it might have

been a defense for non-payment.

14 Harvard Law Review 427, and cases cited.

But the Master found that the Company was not insolvent, and the court held that this finding was binding. Yet we find him arguing in his opinion that because the Company was insolvent in Montana it should not be heard. We know of no rule of law that requires suitors to be solvent in every jurisdiction in which their rights are involved. This Company was solvent in the State of its residence, and any insolvency in the State of Montana was due to the fact that respondents had bought all of its assets in that State. Certainly they cannot base any cause of action out of a state of facts of their own creation.

Besides, a party who insists upon specific performance by the other party, must show specific performance on his own part. If a recission or abandonment is desired, he need only show non-performance or inability to perform by the other party.

Runkle vs. Johnson, 83 Am. Dec. 191.

To obtain specific performance of a contract, complainant must show performance on his part of the express and essential terms of the contract.

Fry on Specific Performance, Sec. 904.

Pomeroy, Sec. 534.

Where the contract shows that plaintiff has failed to meet the substantial terms of the very agreement on which he relied, he cannot complain if a court of equity leaves him where he has placed himself.

Beach Modern Law of Contracts, Sec. 897.

It is a fundamental doctrine of the court of equity that neither party to a contract will be permitted to enforce it specifically against the other, until he has shown that he has done or offered to do every material act or thing required of him by the agreement, in exact accordance with its terms and conditions.

To be in a position to demand a specific performance of this contract, the respondents should have exactly performed every act which the contract called upon them to perform. They should have made every payment as it fell due, and having failed to do this, they cannot now come into this court and demand that the appellants be compelled to perform a contract which they, themselves, have treated as null and void.

We therefore respectfully submit that the court erred in the particulars complained of, and that the judgment should be reversed with instructions to dismiss the bill for want of equity.

Respectfuly submitted.

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E. C. DAY,

W. E. CULLEN, JR.,

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